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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re I.V. et al., Persons Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. EMMA C. et al., Defendants and Appellants.	D075341 (Super. Ct. No. NJ13978)

APPEAL from orders of the Superior Court of San Diego County, Gary M. Bubis, Judge. Affirmed.

Katherine A. Clark, under appointment by the Court of Appeal, for Defendant and Appellant, Emma C.

Jamie A. Moran, under appointment by the Court of Appeal, for Defendant and Appellant, I.V.V.

Thomas E. Montgomery, County Counsel, Caitlin E. Rae, Chief Deputy County Counsel, and Patrice Plattner-Grainger, Deputy County Counsel, for Plaintiff and Respondent.

Emma C. (Mother) and I.V.V. (Father) appeal (1) orders denying a hearing on their petitions to modify their children's placement under Welfare and Institutions Code section 388[1] (section 388 petitions) and (2) orders terminating their parental rights under section 366.26. The parents argue they made a showing of changed circumstances and that it was in their children's best interests to be returned to parental custody. The parents further argue the juvenile court erred in finding the beneficial relationship exception to termination of parental rights did not apply (§ 366.26, subd. (c)(l)(B)(i)). We do not find merit in Mother and Father's arguments and accordingly affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

This is the second appeal arising out of minors I.V. and V.V.'s dependency cases. Per the request of the San Diego County Health and Human Services Agency (Agency), we take judicial notice of our prior opinion, *In re I.V.* (Feb. 4, 2019, D074467) [nonpub. opn.] (*I.V. I*). We briefly summarize the facts from our prior opinion and provide additional relevant background.

Mother has four biological children and a history of involvement with child protective services due to methamphetamine addiction and domestic violence. In 2008, the Agency initiated dependency proceedings on behalf of her two older daughters, who

1 Further unspecified statutory references are to the Welfare and Institutions Code.

are now teenagers. Mother did not attend her drug treatment program or complete her reunification plan. Her daughters were placed in a guardianship with the maternal grandparents. (*I.V. I*, *supra*, at p. 2.)

Father and Mother have been in a relationship for over 15 years and are the biological parents of the subject minors in this appeal, eight-year-old I.V. and three-year-old V.V. (together, the children). The parents are recurring methamphetamine addicts, and they frequently fought with each other in the children's presence. In one 2017 domestic dispute, Father threatened Mother with a knife. In June 2017, the juvenile court assumed dependency jurisdiction over the children on grounds of their parents' use of methamphetamine, domestic incidents, and general neglect, and removed the children from parental custody. On June 29, 2017, the children (then ages six and one) were placed in the home of the maternal uncle (Uncle) and aunt (Aunt), where they have since continuously resided. Uncle and Aunt love the children and intend to adopt them. (*I.V. I*, *supra*, at pp. 2-4.)

Between July 2017 and January 2018, Mother did not have visits or contact with the children. Mother lived in Mexico or on the streets during this time and was still using drugs. Father had a few sporadic visits with the children in 2017, with a five-month gap of no visits. The court terminated Mother's and Father's reunification services at the six-month and 12-month review hearings, respectively, because they failed to make

substantial progress on their case plans.[2] (*I.V. I, supra*, at pp. 4-6.)

In April 2018, Mother entered an inpatient drug treatment program in San Diego and began a period of sobriety. She also began having relatively consistent, supervised visits with the children about twice a week. Mother was affectionate toward the children and generally displayed appropriate parenting skills. However, the visits were not always positive; they sometimes caused I.V. and V.V. to become uncomfortable or upset. (See *I.V. I, supra*, at pp. 6-7.) The children referred to Mother as "Emma" when speaking about her to other people. Both children looked to Aunt and Uncle to meet all their needs. Aunt and Uncle's own biological children (cousins) lived in the same home as the children; I.V. and V.V. maintained a sibling-like relationship with these cousins. As time went on, I.V. wished to shorten and/or discontinue visits with Mother. In his own words, I.V. believed (1) his caregiving family was "perfect" and (2) that Aunt and Uncle were his "mom" and "dad." Mother did not complete services for domestic violence and was still in contact with Father during the first half of 2018.

Father missed many scheduled visits with the children in 2018 due to being incarcerated or in "detox." Between March and July 2018, he had four supervised visits with the children. In November 2018, Father entered a rehabilitation center. Thereafter, both children displayed apprehension and/or anxiety at the thought of recommencing visits with him, and I.V. refused further visits.

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[2] Father was arrested on various drug charges in August 2017. He was incarcerated and subsequently released to a substance abuse program. He transitioned out of his treatment program in March 2018 and tested positive for methamphetamine less than two weeks later. (*In re I.V. I, supra*, at p. 5, fn. 3.)

On January 31, 2019, and February 1, 2019, respectively, Father and Mother filed section 388 petitions to modify the court's prior placement orders. Father's petition sought the children's placement with him, or alternatively, to extend his reunification services to May 2019. Mother's petition sought the children's placement with her. As changed circumstances, Father primarily alleged he had "maintained his sobriety" (based on his participation in an inpatient rehabilitation program for about two months), while Mother stated she had completed an inpatient drug treatment program, was maintaining her sobriety, could provide for the children, and had visited them consistently. The parents alleged that a change in the children's placement was in their best interests because of their relationship with Father/Mother.

On February 1, directly preceding the scheduled permanency planning hearing (section 366.26 hearing), the court held a prima facie hearing on the section 388 petitions. The court stated on the record that it had "read and considered the entire [case] file," the parents' petitions, and counsel's comments. It found the parents had not made a prima facie showing on their section 388 petitions. The court discussed that, given the longstanding domestic violence and substance abuse issues going back well over a decade, the parents had not demonstrated changed circumstances or that a change in the children's placement would be in their best interests. The court noted there was "not one ounce of evidence" Mother had addressed the domestic violence issues in the case, Mother and Father could renew their relationship at any time, and he had a recent history of drug relapses and was in complete denial of domestic violence. Additionally, the court remarked that the children "have lived . . . very difficult [lives] with tons of childhood

trauma, and to just take them out of a secure placement . . . and plac[e] them with these parents would be a tragedy."

The court immediately proceeded to conduct the section 366.26 hearing. It received in evidence several Agency reports, a report of a court appointed special advocate (CASA), and visitation logs submitted by Mother, without objection. The Agency's and CASA's reports described the children's health and developmental background, interactions and visits with each parent, and I.V.'s clear preference to remain living with Aunt and Uncle. The Agency recommended adoption as the children's permanent plan and assessed the children to be specifically adoptable (by the relative caregivers) and generally adoptable (based on there being 47 approved families in San Diego County willing to adopt a sibling set matching the children's characteristics). Furthermore, regarding the parent-child bond, in the Agency's assessment the children viewed Mother as a loving relative and Father as a friendly visitor—not as parents. The children overwhelmingly looked to the relative caregivers to meet their physical, emotional, and developmental needs on a daily basis. In the Agency's evaluation, the benefits of adoption outweighed any risk to the children from severing their relationship with the parents.

The court also heard live testimony at the section 366.26 hearing from Mother and the assigned social worker. Mother admitted she was a "recurring addict" and had not been "the best mom," but stated that she loved the children and had "turned [herself] around." She believed the children had distanced themselves from her because of pressure from the social worker and/or relatives.

After considering the evidence and arguments of counsel, the juvenile court found the children were adoptable, terminated parental rights, and selected adoption as the permanent plan. It considered and rejected the applicability of the beneficial relationship exception to termination of parental rights, indicating on the record that it had weighed the "quality of the parental relationship" with the benefits of being adopted by the relative caregivers. The court explicitly rejected the notion that the relatives and/or social worker had engaged in any kind of "conspiracy" to detach the children from Mother. The parents filed timely appeals.

DISCUSSION

I. *The Court Did Not Err in Denying the Parents' Section 388 Petitions on a Prima Facie Basis*

Under section 388, a parent may petition to change or set aside a prior order "upon grounds of change of circumstance or new evidence." (§ 388, subd. (a)(l); see Cal. Rules of Court, rule 5.570(a).)[3] The juvenile court shall order a hearing if "it appears that the best interests of the child . . . may be promoted" by the proposed change of order. (§ 388, subd. (d).) Accordingly, a parent must make a prima facie showing of *both* a change in circumstances or new evidence *and* the promotion of the child's best interests to trigger a right to hearing on a section 388 petition. (*In re Zachary G.* (l999) 77 Cal.App.4th 799, 806, 808.)

A prima facie case is made if the allegations demonstrate that these two elements are supported by probable cause. (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432; *In re*

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3 Further rule references are to the California Rules of Court.

Jeremy W. (1992) 3 Cal.App.4th 1407, 1414.) It is not made, however, if the allegations would fail to sustain a favorable decision even if they were found to be true at a hearing. (Rule 5.570(d)(1); *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) While the petition must be liberally construed in favor of its sufficiency (*In re Zachary G., supra,* 77 Cal.App.4th at p. 806; rule 5.570(a)), the allegations must nonetheless describe specifically how the requested change of order will advance the child's best interests. (*Anthony W.,* at p. 250; *Zachary G.,* at p. 806.)

After reunification efforts have terminated, the juvenile court's focus shifts from family reunification toward promoting the child's needs for permanency and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) " 'A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child.' " (*In re J.C.* (2014) 226 Cal.App.4th 503, 527.) Therefore, "after reunification services have terminated, a parent's petition for either an order returning custody or reopening reunification efforts *must establish how such a change will advance the child's need for permanency and stability*." (*Ibid.*, italics added.)

In this case, we conclude the parents' section 388 petitions failed to make a prima facie showing of a change in circumstance or new evidence, and even if there were changed circumstances, the petitions failed to show how the children's best interests would be promoted.

Regarding Father, we agree with the juvenile court's finding that, given his longstanding drug issues and history of relapses, two months of sobriety at the time of his

petition did not present a "change of circumstance." (Cf. *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9 ["It is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform."].) Further, he was absent from the children's lives for much of 2018, they were not bonded to him, and they no longer wished to see him. Father did not adequately show that the children should be returned to his care or he should receive further services.

Regarding Mother, although she had maintained sobriety for a longer period than Father, she had not shown insight into the protective risks associated with domestic violence.[4] There is no evidence Mother could safely and independently care for the children since she failed to progress to unsupervised or overnight visits throughout the dependency cases. She recently admitted she was still working on "stabilizing her life." Given the protective issues in this case, we cannot say the juvenile court abused its discretion in finding that Mother's circumstances had not truly changed. (See *In re Casey D.* (1999) 70 Cal.App.4th 38, 49 [petitioner must show "changed" not merely "changing" circumstances].)

Moreover, even assuming Mother's circumstances had changed, she failed to show that modifying the children's placement would be in their best interests, i.e., that it would advance their need for permanence and stability. By February 2019, the children had

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4 The record largely supports that Mother maintained sobriety from April 2018 through early 2019; however, we note she failed to drug test on December 26, 2018, in connection with her participation in Dependency Drug Court (DDC). She subsequently tested clean on December 31, 2018. Mother also occasionally struggled to both (1) maintain good compliance with her drug treatment programs and (2) attend her scheduled visits.

been stably living with their relative caregivers for over 19 months. V.V. had no memory of ever living with Mother, while I.V. expressed a clear desire to continue living with Aunt and Uncle, who he considered his "mom" and "dad." The children were safe, secure, and thriving in their current placement. We discuss further, *post*, that it was in the children's best interests to be adopted.

Finally, we are not convinced the court's failure to order a separate hearing on the section 388 petitions was prejudicial. The petitions were argued right before the section 366.26 hearing, and the issues and evidence overlapped. Mother testified at the section 366.26 hearing regarding her circumstances and extent of her relationship with the children. Father had the opportunity to testify, and his counsel made arguments on his behalf. The court concluded it was in the children's best interests to terminate parental rights and be adopted. Given these findings, any error in the court's failure to hold a separate evidentiary hearing on the section 388 petitions was harmless. (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1161-1162 [court's failure to hold a hearing on section 388 petition was not prejudicial given the evidence received by court and findings made at selection-and-implementation hearing].) The parents have failed to establish reversible error.

II. *The Court Did Not Err in Finding that the Beneficial Relationship Exception to Termination of Parental Rights Did Not Apply*

Mother argues the court erred in finding that the beneficial relationship exception to termination of parental rights and adoption did not apply to her. (§ 366.26, subd. (c)(l)(B)(i).) Father joins in Mother's argument and contends that if we reverse the order

terminating her parental rights, we must also reverse the order as to him. We conclude the court did not err.

A. *Legal Standards*

At a permanency planning hearing, once the juvenile court finds by clear and convincing evidence that the child is likely to be adopted within a reasonable time, the court is required to terminate parental rights and select adoption as the permanent plan, unless the parent shows that termination of parental rights would be detrimental to the child under one of several statutory exceptions. (*In re Michael G.* (2012) 203 Cal.App.4th 580, 589.) One of these statutory exceptions is the beneficial parent-child relationship exception to adoption, which applies when it would be detrimental to the child to terminate parental rights based on the facts that "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).)[5] The burden is on the party seeking to establish the beneficial relationship exception to produce evidence establishing the requirements of the exception. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314 (*Bailey J.*).)

Once the juvenile court finds that a parent has met his or her burden to establish the requirements of the beneficial relationship exception, the juvenile court may choose a permanent plan other than adoption if it determines that terminating the beneficial

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5 "Regular visitation exists where the parents visit consistently and to the extent permitted by court orders." (*In re I.R.* (2014) 226 Cal.App.4th 201, 212.) "Sporadic visitation is insufficient to satisfy the first prong of the parent-child relationship exception to adoption." (*In re C.F.* (2011) 193 Cal.App.4th 549, 554 (*C.F.*).)

relationship would be "detrimental to the child." (§ 366.26, subd. (c)(1)(B); see *Bailey J., supra,* 189 Cal.App.4th at pp. 1314-1315.)

We apply the substantial evidence standard of review to the factual issue of the existence of a beneficial parent-child relationship, and the abuse of discretion standard to the determination of whether there is a compelling reason for finding that termination would be detrimental to the child. (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 395; *Bailey J., supra,* 189 Cal.App.4th at pp. 1314-1315.) We do not reweigh the evidence, evaluate the credibility of witnesses or resolve evidentiary conflicts. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576 (*Autumn H.*).)

B. *Analysis*

As we have explained, there are two factual predicates to establishing the beneficial relationship exception, namely, (1) "regular visitation and contact" and (2) that "the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) Here, the juvenile court appeared to accept that Mother established regular visitation; the record supports her relatively consistent, generally positive visits with the children from 2018 and on. In addition, it was undisputed that Mother loved the children and that they cared about her to some degree in return. Nevertheless, the court remarked it had a duty to "weigh this parental relationship [and] look at the quality of the parental relationship." The critical issue before us then is whether the court abused its discretion in finding that severing the parent-child relationship would not be detrimental to the children. (§ 366.26, subd. (c)(l)(B); *C.F., supra,* 193 Cal.App.4th at p. 555.)

In making the determination of whether a beneficial relationship presents a compelling reason to order an alternative to adoption, the court applies a balancing test in which it weighs "the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer." (*Autumn H., supra*, 27 Cal.App.4th at p. 575.) The juvenile court must evaluate the issue on a case-by-case basis, considering the many variables that can affect the parent-child relationship. (*Id*. at pp. 575-576; *In re J.C., supra*, 226 Cal.App.4th at p. 532.) Among the variables to be considered in evaluating the benefits of a parental relationship are the child's age, the amount of time the child spent in the parent's care, whether the interactions are positive or negative, and whether the child has particular needs that only the parent can satisfy. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467; see also *In re Jason J.* (2009) 175 Cal.App.4th 922, 938.) It is not enough for a parent to show frequent and loving contact during pleasant visits. (*C.F., supra*, 193 Cal.App.4th at p. 555.) More than incidental benefits from maintaining parental contact are required for this exception to apply. (*Id.* at pp. 558-559; *In re Helen W.* (2007) 150 Cal.App.4th 71, 79-80.)

"A juvenile court finding that the relationship is a 'compelling reason' for finding detriment to the child" is "a 'quintessentially' discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption." (*Bailey J., supra*, 189 Cal.App.4th at p. 1315.) The parent seeking to establish the beneficial relationship exception to adoption must

prove *not only* that it would benefit the child to continue the parental relationship, but also that continuing the relationship would "promote[] the well-being of the child to such a degree *as to outweigh* the well-being the child would gain in a permanent home with new, adoptive parents." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575, italics added.)

Under the balancing test set forth in *Autumn H.*, we conclude the juvenile court acted within its discretion in finding that terminating Mother's parental rights would not be detrimental to the children.

The record supports that Mother was not fulfilling a parental role in the children's lives. She never progressed to unsupervised visits throughout the dependency cases. As the juvenile court pointed out, V.V. lived over half her young life with the relative caregivers—she had no memory of ever living with Mother.[6] As to I.V., when asked about his early childhood, all he remembered was Mother and Father fighting, doing drugs, and hitting him. These were frightening memories for him. Both children viewed Aunt and Uncle as parents for all intents and purposes; they were highly attached to Aunt and Uncle, and had no difficulties separating from Mother. By the time of the section 366.26 hearing, the relatives had cared for the children for over a year and a half, and the children relied on them for their daily needs, positive interactions, stability, and security. The children and caregivers were mutually loving, and the children were happy in the relatives' care.

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6 Moreover, the record indicates that V.V. was seriously endangered while living with Mother. For example, as reflected in the Agency's detention report, one-year-old V.V. was left unattended for up to hours at a time during the parents' domestic disputes.

Furthermore, I.V. was suffering some lingering effects from his past family dysfunction. Certain stressors, reminiscent of his volatile early life, caused symptoms of anxiety and insecurity in him. He had been diagnosed with a type of adjustment disorder and learning disorders,[7] which would require unwavering support for recovery. The juvenile court could reasonably conclude that the children's needs would be best addressed by allowing them to be adopted by relative caregivers who had shown an ability to provide them with the type of structure and care that would facilitate continued recovery.

The record fails to show that Mother's relationship with the children was so beneficial that it outweighed the benefit they would gain from being adopted. (*Autumn H., supra*, 27 Cal.App.4th at p. 575.) Accordingly, there is no merit to her claim that the beneficial relationship exception applies in this case.

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[7] A child psychologist attributed I.V.'s learning disorders to "past parental neglect" and "missed early educational and enrichment opportunities."

DISPOSITION

The orders are affirmed.

O'ROURKE, Acting P. J.

WE CONCUR:

AARON, J.

DATO, J.